No. 82-1058

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,
*Petitioners*

v.

STATE OF CONNECTICUT, *et al.*,
*Respondents*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Congress, when making reference in a continuing appropriations resolution to a pending bill as a means of establishing the extent and manner of appropriations for fiscal year 1982, thereby also enacted into permanent law provisions of the pending bill relating to other fiscal years.

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This Brief in Opposition to the Petition for a Writ of Certiorari is submitted on behalf of the States of Connecticut, Illinois, Maryland, Michigan, New Jersey, New York, Oklahoma, Pennsylvania, and Wisconsin, plaintiffs-appellants below, and the State of California, intervening plaintiff and appellant below.

The decision of the Court of Appeals for the District of Columbia Circuit (Circuit Judges Edwards and Bork, and District Judge Bonsal) resolved in respondents' favor the dispute over interpretation of the fiscal year 1981 appropriations laws. The petition does not seek review of the decision on this issue; rather, it rests solely upon the claimed failure of the Court of Appeals to apply a provi-

sion allegedly incorporated by reference into a continuing appropriations resolution for fiscal year 1982. The petition suggests the Court consider summary reversal.

We show in this brief that the provision relied upon in the petition never became law, directly or by incorporation in another statute, and cannot provide a basis for challenging the decision of the Court of Appeals. In addition, subsequent to the Court of Appeals' decision, the Congress rejected efforts to adopt by statute the very position urged in the petition, and instead enacted a further provision that established a framework for payment of the state claims that are the subject of this litigation.

Accordingly, there is no cause for either summary reversal or plenary review by this Court. The legal point advanced in the petition is without merit, and in any case the intervening action by Congress resolves this issue and emphasizes the absence of any need for issuance of a writ of certiorari.

## OPINIONS BELOW

In addition to the opinions and orders appended to the petition for a writ of certiorari, the Court of Appeals issued an order dated November 19, 1982, which is reprinted in Appendix A, pp. 1a-2a.

## STATUTORY PROVISIONS INVOLVED

In addition to the provisions quoted in the petition, this case involves the following statutory provisions:

1. *Third Fiscal 1982 Continuing Appropriations Resolution.* The Joint Resolution of December 15, 1981, Pub. L. No. 97-92, 95 Stat. 1183, provided in relevant part:

> "That the following sums are appropriated . . . for the several departments of the Government for the fiscal year 1982, and for other purposes, namely:
>
> "Sec. 101. (a) (1) Such amounts as may be necessary for projects or activities . . . for which appro-

priations . . . would be available in the following appropriations Acts:

. . .

"Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act, 1982;

. . . .

"(2) Appropriations made by this subsection shall be available to the extent and in the manner which would be provided by the pertinent appropriation Act."

2. *First Fiscal 1983 Continuing Appropriations Resolution.* Section 136 of the Joint Resolution of October 2, 1982, Pub. L. 97-276, 96 Stat. 1186, 1197-98, provides:

"Notwithstanding the decision of the United States Court of Appeals for the District of Columbia Circuit in Connecticut against Schweiker (No. 81-2090, July 27, 1982), section 306 of Public Law 96-272, or section 1132 of the Social Security Act, no payment shall be made, in or with respect to any fiscal year prior to fiscal year 1984, under this or any other Act, and no court shall award or enforce any payment (whether or not pursuant to such decision) from amounts appropriated by this or any other Act, to reimburse State or local expenditures made prior to October 1, 1978, under title I, IV, X, XIV, XVI, XIX, or XX of the Social Security Act, unless a request for reimbursement had been officially transmitted to the Federal Government by the State within one year after the fiscal year in which the expenditure occurred. After fiscal year 1983, any payment made to reimburse such State or local expenditures required to be reimbursed by a court decision in any case filed prior to September 30, 1982, shall be made in accordance with a schedule, to be established under the Social Security Act, over fiscal years 1984 through 1986."

## STATEMENT

The following is a summary of the relevant facts. The decision of the Court of Appeals (Appendix A to the petition) contains a more detailed factual statement.

### 1. *Claims Covered By The Dispute*

The respondent states participate in various Social Security Act matching fund programs that provide welfare and health assistance to persons in need. Traditionally, federal funds (known as federal financial participation or "FFP") have been made available to states on a current basis to insure that the programs are sufficiently financed. However, it is not uncommon for states to seek FFP for past-period expenditures where the entire cost was borne by the state initially and FFP was not sought on a current basis. This can occur for various reasons: states are frequently required to exhaust other potential funding sources for medical services before turning to the Medicaid program; internal audits or reviews disclose expenditures subject to FFP that were not identified when the current period claims were calculated; changes in federal policy can indicate eligibility for FFP of expenditures thought previously to be ineligible. This case involves an effort by the Secretary to avoid payment of certain back claims of the states, without regard to their underlying merit.

### 2. *Adoption of Time Limits for Filing Back Claims*

Until very recently, there was no time limit on the submission of FFP claims by states. But in reporting H.R. 4389, the fiscal year 1980 appropriations bill for the Department of Health, Education, and Welfare (now known as the Department of Health and Human Services ("DHHS")), the appropriations committees of the respective Houses of Congress included a limitation precluding the use of the funds appropriated for that year to pay any state claim for FFP with respect to pre-September 30, 1978, expenditures, unless the claim had been

submitted within one year after the state expenditure was incurred. H.R. 4389 was never enacted into law. However, the limitation took effect as a condition to the use of fiscal year 1980 funds by virtue of the fiscal year 1980 Continuing Appropriations Resolutions, which maintained funding for the Department for the year subject to the terms of H.R. 4389. Pub. L. 96-86, 93 Stat. 656 (1979); Pub. L. 96-123, 93 Stat. 923 (1979).

The time limitation provision in H.R. 4389 concerned states because of its potential impact on their legitimate claims for FFP. State concerns were expressed during hearings of the Senate Finance Committee on an omnibus bill to revise the Social Security Act.[1] The Committee responded by adding to the bill a provision that, after further floor amendment in the Senate and adoption by the Conference Committee, became section 306 of the Adoption Assistance and Child Welfare Act of 1980. Pub. L. 96-272, § 306, 94 Stat. 500, 530-31 (reprinted in part at pages 2-3 of the petition). This section established prospective time limits for submission of state claims for FFP. It permitted processing and payment of claims already on file and established a specific time limit for filing claims for past expenditures that had not yet been filed. The section was intended to nullify the limitation in H.R. 4389 (*see* Pet., App. pp. 24a-30a), and it specifically stated that its provisions were not to be modified except by statute expressly referring to section 306.

### 3. *The 1981 Continuing Appropriations Resolutions*

Congress was again unable to agree on an appropriations bill for the Department for fiscal 1981, and once again continuing resolutions became the Department's source of funds. The 1981 resolutions referred for funding levels and conditions to the applicable appropriations

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[1] *See* Hearings on H.R. 3434 before the Subcommittee on Public Assistance of the Senate Committee on Finance, 96th Cong., 1st Sess. (1979), pp. 2, 124-28.

laws for fiscal 1980. *See* Pub. L. 96-369, § 101(a)(2), 94 Stat. 1351 (1980); Pub. L. 96-536, § 101(a)(2), 94 Stat. 3166 (1980); Pub. L. 97-12, § 401, 95 Stat. 14, 95 (1981). For DHHS, this meant the 1980 continuing resolutions, which in turn had referred to the terms of H.R. 4389.

The Department took the view that this "double incorporation" included the time limitation on filing of state claims contained in H.R. 4389, so that 1981 appropriated funds could not be used to pay pre-September 30, 1978, claims even if they were filed in compliance with the timetable established in section 306. The states responded that section 306 was expressly intended to nullify the limitation of H.R. 4389, and that the reference in the 1981 continuing resolution to H.R. 4389 (via the reference to 1980 appropriations laws) meant H.R. 4389 as modified by section 306. They also showed that neither the 1981 resolution nor the provisions it referred to met the requirement of section 306 that section 306 be cited expressly in any modifying statute.

This suit was instituted by the states against the Secretary and the Department on September 15, 1981, to resolve the controversy.[2] After submission of pleadings and a hearing on September 28, the District Court on September 30, 1981, decided for the Secretary. The Court of Appeals reversed, and, in an extensive opinion that considered all of the applicable statutory provisions and other legislative materials, adopted the interpretation of

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[2] A rulemaking proceeding had been in process for the preceding several months to consider a proposed regulation embracing the DHHS interpretation of the fiscal 1981 appropriations laws. The plaintiff states had participated in the rulemaking proceeding. Suit was filed on September 15 because of the approaching end of the fiscal year. On September 17, DHHS made final the proposed regulation. *See* Pet., App. pp. 10a-11a.

the states.[3] The court held that section 306 of Public Law 96-272 "was intended to nullify the time limit in H.R. 4389," and it rejected the Secretary's contention that section 306(c) was irrelevant to the construction of an appropriations resolution. Pet., App. pp. 30a, 34a. The petition for a writ of certiorari does not seek review of the Court of Appeals' resolution of the merits of the dispute. Pet., pp. 4, 14, n.11.

#### 4. *The 1982 Continuing Appropriations Resolutions*

While this case was pending, the House passed H.R. 4560, covering appropriations to the Department for fiscal 1982. The bill contained a provision (section 208), on which the petition for a writ of certiorari is based, stating that "notwithstanding section 306 of Public Law 96-272 . . . no payment shall be made from this or any other appropriation" to reimburse any state expenditure made before October 1, 1978, unless a claim was filed within one year after the year in which the expenditure occurred. Although the Senate Appropriations Committee reported a bill with an identical provision, the bill never came to the Senate floor. Thus, for yet another year, it was necessary to fund the Department by continuing appropriations resolutions.

On December 15, 1981, the third continuing resolution for fiscal year 1982 became law (Pub. L. 97-92).[4] Section 101(a), reprinted in pertinent part at pages 2-3, above, appropriated funds for several departments for fiscal year 1982, including DHHS, for "projects or activities" that would have been covered by the "pertinent" appropria-

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[3] The petition, pp. 11-12, does not adequately describe the Court of Appeals' opinion. We invite attention to the opinion itself, especially pages 14a-21a, 29a-36a and 40a-41a of the appendix to the petition.

[4] Two earlier resolutions had maintained the Department's funding from October 1 to December 15, 1981. *See* Pub. L. 97-51, 95 Stat. 958 (1981); Pub. L. 97-85, 95 Stat. 1098 (1981).

tions Acts, "to the extent and in the manner which would be provided by" the "pertinent" Act.[5] The operative language of this law, so far as DHHS was concerned, was the same as had been contained in the first two continuing resolutions for fiscal year 1982. But because the House in the interim had enacted H.R. 4560 and the Senate Appropriations Committee had reported its version of the bill, these bills had become the "pertinent" bills to which the resolution referred.[6]

The Secretary's brief to the Court of Appeals cited Public Law 97-92, and argued (on the last page) that the reference to "any other appropriation" in section 208 of H.R. 4560 precluded any relief for the states. The states replied that Public Law 97-92 applied only to the use of funds appropriated for fiscal 1982, and had no legal effect with respect to any other year's funds, including the funds for 1981, which are the subject of this case. Appellants' Reply Br., p. 20, n.*. While the Court of Appeals gave effect to H.R. 4560 (as referred to by Public Law 97-92) for fiscal year 1982 (Pet., App. pp. 33a-34a), it rejected the Secretary's argument that the 1982 continuing resolution also served to bar use of 1981 funds. *Id.*, p. 41a, n.36.

The Secretary petitioned for rehearing and requested *en banc* consideration. His petition raised only the question of applicability to 1981 funds of the third 1982 continuing resolution (Public Law 97-92)—the same question presented to this Court. The petition for rehearing argued that the limitation of H.R. 4560 was incorporated

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[5] This law carried an expiration date of March 31, 1982. By Public Law 97-161, 96 Stat. 22, passed on March 31, 1982, the expiration date was extended to September 30, 1982, thus covering the balance of the fiscal year.

[6] Under the first two resolutions for fiscal year 1982 (*see* note 4, page 7, above), DHHS appropriations were continued on the same basis as the previous year, in the absence of enactment of H.R. 4560 by either House by October 1, 1981.

*in toto* into Public Law 97-92, and that this limitation, through its reference to "any other appropriation," extinguished the state claims that are the subject of this litigation. The petition was denied by the panel, and none of the eleven active judges on the court agreed with the suggestion for *en banc* consideration. Pet., App. pp. 45a, 46a.

5. ***The 1983 Continuing Appropriations Resolutions***

Congress was unable to complete the 1983 appropriations bill for the Department before the end of its regular session in Fall 1982. Accordingly, a continuing appropriations resolution was adopted by the House on September 16, 1982, covering DHHS, among other departments. When the bill (H.J. Res. 599) was reported by the Senate Appropriations Committee on September 23, 1982, it included a new provision (section 133), not contained in the House-passed resolution, prohibiting the payment from "this or any other Act" of any state claim for FFP in expenditures incurred prior to October 1, 1978, unless the claim had been submitted within one year after the year in which the expenditure was incurred. The accompanying report (S. Rep. No. 97-581, 97th Cong., 2d Sess., p. 14) stated that the purpose of the added provision was to overturn the decision of the Court of Appeals and to give effect to the limitation that had been contained in section 208 of H.R. 4560 and on which the Secretary relies in the petition for a writ of certiorari. It further stated that all claims not meeting the one-year filing deadline—the claims at issue in this case—were to be "permanently extinguished." *See* App. B, pp. 3a-4a.

This provision was strongly resisted on the Senate floor and it did not pass. Many Senators pointed out that the claims in question had been submitted within the time limits established in section 306 of Public Law 96-272, and objected to the effort to undo the solution to the time limitation issue that Congress had adopted in section 306. They also stressed the unfairness of extinguishing states'

rights to payment of legitimate claims, and objected to the last-minute, ex parte manner in which the issue had been raised. 128 Cong. Rec. S12487-90, S12498-99, S12609, S12912 (daily eds. Sept. 29 and 30, 1982). Ultimately, a compromise was reached which rejected the proposal to extinguish the states' claims by precluding payment out of any appropriation. Instead, it was provided that no outlay would be made to pay for any of the back claims until fiscal year 1984, but if the Court of Appeals' decision became final, payment would be made over a three-year period pursuant to a schedule to be adopted under the Social Security Act. *Id.* at S12498-99 (daily ed. Sept. 29, 1982). Both sides in the debate stressed that the compromise solution was not intended to prejudice the Court of Appeals' decision. *Id.* at S12498.

The Senate compromise was adopted in conference with one minor technical amendment and became section 136 of Public Law 97-276, the first continuing appropriations resolution for fiscal year 1983. The conference report (the only portion of this legislative history referred to in the petition for a writ of certiorari) repeated the understanding that section 136 (unlike the provision initially proposed) was not intended to prejudice the Court of Appeals' decision.[7] H.R. Rep. No. 97-914, 97th Cong., 2d Sess. (1982), pp. 23-24.[8]

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[7] The precise words of the statute in this respect are:

> "After fiscal year 1983, any payment made to reimburse such State or local expenditures *required to be reimbursed by a court decision* in any case filed prior to September 30, 1982, shall be made in accordance with a schedule, to be established under the Social Security Act, over fiscal years 1984 through 1986." (Emphasis supplied.)

While this statute does not preclude further review of the Court of Appeals' decision, it establishes the framework for payment of the states' claims on the premise that the decision will become final.

[8] Section 136 is reprinted at page 3 above. The relevant passages from the floor debates and the Conference Report, cited above, are

[Footnote continued]

In recognition that section 136 of Public Law 97-276 represents a solution of the problem of payment of the state back claims, the second continuing appropriations resolution for fiscal year 1983 (which, unlike all prior continuing resolutions, contains the full text of a DHHS appropriation law) omits any provision limiting use of the funds appropriated to pay the state back claims. Pub. L. 97-377, 96 Stat. 1830 (1982).

Subsequent to the enactment of section 136, the Secretary sought a stay of issuance of mandate from the Court of Appeals pending the submission of his certiorari petition.[9] The court denied the motion, citing section 136 of Public Law 97-276 and noting that commencement of the proceedings on remand to fashion the proper relief was appropriate in light of "Congress's direction that payments begin approximately October 1, 1983." App. A pp. 1a-2a.

The petition for a writ of certiorari followed.

## ARGUMENT

The petition for a writ of certiorari and its suggestion of summary reversal rest entirely on the premise that the Congress, as part of the third 1982 continuing appropriations resolution (Pub. L. 97-92), enacted a law prohibiting payment of the claims in question from any funding source, thereby effectively extinguishing the states' rights to receive FFP from any source, including fiscal 1981 appropriations, for the expenditures represented by the claims. The error attributed to the Court of Appeals, described in the petition as "egregious," is

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reproduced in the plaintiff states' Opposition to the Motion for Stay of Mandate filed on October 4, 1982, in the Court of Appeals, which was also appended to their Opposition to the Motion to Extend Stay of Mandate, filed November 2, 1982.

[9] The court had earlier granted the Secretary's request for a stay of mandate for thirty days to permit the Solicitor General to decide whether to submit a petition for a writ of certiorari.

the court's failure so to read and apply the third 1982 continuing resolution.

The petition's premise is false. Congress has never enacted the law relied on by the Secretary, directly or indirectly. H.R. 4560, which contains section 208 on which the Secretary relies, was referred to in the third 1982 continuing resolution *only* to establish the amount and conditions of appropriations made for fiscal year 1982. The third 1982 continuing resolution had no effect on funds appropriated in 1981.

Moreover, on the two occasions when Congress has given plenary consideration to the subject here involved, it has acted to preserve the states' entitlement to have their back claims considered on their merits and paid to the extent valid. In its most recent consideration of the subject, it squarely rejected the view advanced in the Secretary's petition and refused to overturn the decision of the Court of Appeals. Instead, it established a framework for payment of the claims in question.

If the term "egregious" has any application in this case, it would be to describe the Secretary's maintenance of an unprecedented position that valid rights to FFP in expenditures incurred in accordance with federal promises of reimbursement should be obliterated, notwithstanding the considered refusal of Congress to approve such a course.

1. In arguing that the third 1982 continuing appropriations resolution (Public Law 97-92) reflects a Congressional intention "to prevent payment of respondents' claims from *any* existing funding source, not merely 1982 appropriated funds," the petition admonishes that analysis must begin with "the language employed by Congress in Pub. L. No. 97-92." Pet., p. 13. We agree. Not only does the "language employed" (which is reprinted at pages 2-3 above) not contain the provision that the petition attributes to the law, it precludes any indirect incorporation by reference of the provision.

The statute (Public Law 97-92) makes appropriations "for the fiscal year 1982" for projects and activities covered in specified appropriations laws that had not been enacted in their own right, including the appropriation for DHHS. The statute makes the funds appropriated for 1982 available "to the extent and in the manner which would be provided in the pertinent appropriation Act." There is nothing else in the statute that incorporates by reference any pending bill. Any conclusion that a provision in H.R. 4560 pertaining to other years' funds was enacted into law must derive from these words of Public Law 97-92.

The Secretary's case assumes that these words of Public Law 97-92 incorporated the entirety of H.R. 4560 into law. That is certainly incorrect. As can be seen, H.R. 4560 is referred to for only one purpose—to determine the "extent" and "manner" of the appropriation of *1982 funds*. The provision of section 208 of H.R. 4560 on which the Secretary relies—the prohibition on use of funds from "any other appropriation" to pay the state claims in question—has nothing to do with the extent and manner of the appropriation for 1982. It was therefore not encompassed by "the language employed by Congress in Pub. L. No. 97-92," if the "ordinary meaning of the words used" is followed. *See* Pet., p. 13.

Nothing in the legislative record suggests that the references to H.R. 4560 should be read any more expansively than is indicated by the limited words used in Public Law 97-92. When it enacted Public Law 97-92 Congress was doing no more than extending a "stopgap" funding law in order to prevent a cessation of government operations. It was not purporting to deal with substantive matters, beyond those expressly covered by other sections of the statute.[10] In the case of DHHS,

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[10] Many substantive matters were dealt with in separate sections of Public Law 97-92. For example, there were substantive amend-

[Footnote continued]

the language of the third continuing resolution was identical to what had been used in the first continuing resolution for fiscal 1982 (Pub. L. 97-51, extended by Pub. L. 97-85).[11] It is not reasonable to believe that this limited action to keep the government functioning also had the effect of withdrawing the states' entitlement to be paid for claims that the Congress had, only one year before (in section 306 of Public Law 97-272), specifically sought to preserve.[12]

Apart from the limited reference effected by the plain words of Public Law 97-92, the strongest evidence that the provision relied on by the Secretary was not enacted

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ments to the Medicaid provisions of the Social Security Act (section 118); additional conditions to the receipt of education grant funds were established (section 124). In the first 1983 continuing appropriations resolution (Pub. L. 97-276), Congress dealt squarely with the subject of this litigation in a separate section (section 136). These instances constitute further evidence that Congress did not intend in the third 1982 resolution, where there was no separate section dealing with this subject, to adopt the prohibition applicable to all funding sources that the Secretary seeks to read into the law.

[11] At this time H.R. 4560 had not passed the House, so that the referent to determine the level and terms of the Department's 1982 appropriation was the 1981 appropriation. *See* p. 8, note 6 above.

[12] Even where there is ambiguity concerning whether a provision in an appropriations statute is intended as permanent law or only as a limitation on use of funds for a particular year, settled principles of statutory construction require interpreting the provision only as a restriction on use of the particular appropriation. This is because Congress' rules forbid substantive legislation via appropriations bills, and although Congress has the power to legislate in disregard of these rules, courts will presume that Congress has not violated its own rules where any doubt exists. *See, e.g.*, TVA v. Hill, 437 U.S. 153, 190-91 (1978); *see also* Andrus v. Sierra Club, 442 U.S. 347, 359-61 (1979). This is a particularly strong case for concluding that Congress did not intend to enact permanent law by way of an appropriations statute, because no statutory ambiguity is involved; it is clear from the face of Public Law 97-92 that Congress referred to H.R. 4560 solely as a source of standards for the expenditure of 1982 funds.

into law is the manner in which Congress dealt with the provision when its attention was drawn to it. This occurred in September 1982, when an effort was made to have Congress specifically add a section to the first 1983 continuing resolution that would prohibit use of appropriations under "this or any other Act" to pay the state claims in issue. The proposed section was expressly intended to give effect to section 208 of H.R. 4560 and to overrule the decision of the Court of Appeals. *See* App. B pp. 3a-4a. The proposal was rejected, over the Secretary's objections (expressed by Senator Schmitt in the debates), precisely because it would achieve the objective sought by the petition to this Court—elimination of funding sources for legitimate claims for FFP filed in compliance with the timing standards established by Congress in section 306 of Public Law 96-272.[13] Typical of the objections to the Secretary's proposal was the statement of Senator Heinz, who led the opposition effort. After recounting the history of the dispute, including the Court of Appeals' decision, he stated:

> "This last-ditch effort by HHS, one that I consider to be an underhanded method, will override the bill we passed in 1980. It will override the Federal courts' decision. It will change the rules after the game is over—a change that will cost the States $382 million.
>
> "Mr. President, this unprecedented provision repudiates the basic Federal-State agreement at the heart of social security matching programs: The states right to reimbursement of their Federal share of funds States spent in reliance on congressional promise of Federal matching. This not only is outrageously unfair in this particular instance, but this sets a very dangerous precedent for future relations

[13] *See* the Senate debate (cited at page 10 above), particularly the statements of Senators Heinz, Moynihan, Bradley, Danforth, Dole, D'Amato, and Brady, all of whom strongly objected to the proposed section embracing the result contended for in the Secretary's petition.

> between the Federal Government and the States. And the real losers will be the beneficiaries." 128 Cong. Rec. at S12498 (daily ed. Sept. 29, 1982).

In short, all the pertinent evidence—the words of the third 1982 resolution, the circumstances surrounding that resolution, and the prior and subsequent actions by Congress on the issue of payment of the states' back claims —supports the conclusion that the Congress has *never* adopted as law the provision of section 208 of H.R. 4560 that the Secretary says was incorporated into Public Law 97-92. The Secretary's presumption that Public Law 97-92 had this effect—on which his entire petition rests —is without basis.

2. This case is not certworthy. It presents no conflict in circuit decisions. There is no suggestion that a decision of this Court has been ignored or was not followed. The underlying question is narrow, as the Court of Appeals recognized (Pet., pp. 15a, 35a). It relates only to the availability of funds appropriated for fiscal year 1981, to the extent that any such funds remained unobligated at the end of that year. The potential maximum amount involved ($382 million for the ten states involved) is not insignificant; but the actual amount to be paid depends on the allowability of the various claims on the merits.[14] The Court of Appeals committed no error in sustaining the states' position and rejecting the Secretary's statutory arguments.

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[14] Many of the claims have been processed and disallowed, in whole or in part, on their merits. On January 3, 1983, the plaintiff and intervenor-plaintiff states submitted reports to the Department showing that, as of that date, more than $138 million of the claims had been disallowed by the Department. The Department has represented to the District Court in the remand proceeding that it will complete processing of all the ten states' claims by March 31, 1983. For those that have been or will be disallowed, states have an option of seeking administrative review by a Board established by the Secretary for that purpose.

Apart from all this, review by this Court is not warranted because Congress focused specifically on this issue after the decision of the Court of Appeals and adopted a compromise solution that contemplates payment of the state claims in issue from remaining 1981 appropriated funds (as well as any later sums that may be appropriated). The compromise grew out of the efforts (described at pages 9-10 and 15-16 above) to overturn the Court of Appeals' decision and enact the very provision that the Secretary now claims should be enforced by this Court. After many Senators criticized the Senate Appropriations Committee proposal and defended the states' entitlement to payment of legitimate claims for FFP that were submitted in accordance with the timetable adopted by Congress in section 306 of Public Law 96-272, Senator Schmitt attempted to defend the proposal (which the Secretary supported), asserting that payment of the back claims in 1983 could result in reduced funding for other discretionary programs. 128 Cong. Rec. at S12489 (daily ed. Sept. 29, 1982). While not agreeing with this contention, Senator Heinz and others endeavored to resolve the issue by agreement, and after a break in the debate the compromise was announced that delayed the commencement of payment until fiscal year 1984. *Id.* at S12490, S12498. As the Court of Appeals observed (App. A pp. 1a-2a), the compromise solution contemplates commencement of payments on October 1, 1983, assuming that the decision below becomes final. The Congressional solution represents an unambiguous rejection of the Secretary's efforts to remove the remaining 1981 appropriated funds as a source of payment of the back claims.

While the Congressional solution does not preclude Supreme Court review of the decision below, it strongly argues against granting the petition that has been filed, for that petition does *not* seek review of the Court of Appeals' resolution of the issue of interpretation of the 1981 appropriations laws, but instead seeks only to revive the very proposal that has just been resoundingly rejected

by Congress. Section 208 of H.R. 4560 on which the petition is predicated is identical in substance to the provision that was reported in the Senate Appropriations Committee version of the 1983 continuing resolution,[15] was so strongly opposed on the Senate floor, and was eventually discarded in favor of the compromise solution reflected in section 136 of Public Law 97-92. Certiorari jurisdiction ought not be exercised to sustain a position so recently and definitively rejected by the Congress.

The recent Congressional action, as well as the absence of any of the traditional grounds for Supreme Court review, the incorrectness of the one legal argument advanced in the petition, and the failure of the petition to challenge the decision below in any other respect, all demonstrate that this case is not worthy of review.

3. The petition asserts that a constitutional issue lurks in the case (Pet., pp. (I), 2, 12-13), citing Article I, Section 9, Clause 7, of the Constitution. This suggestion is baseless. The sole issue presented is one of statutory interpretation. The Court of Appeals' clearly correct decision on that issue in no way impinges on the exclusive constitutional power of Congress to appropriate moneys.

There *is* a constitutional issue underlying this case, but it would be posed only if the Secretary's position were accepted. The Secretary's contention—that Congress may effectively extinguish states' entitlements by refusing to provide any funding source to reimburse expenditures incurred in accordance with statutory commitments to supply federal matching funds—raises substantial questions as to the limits of the Congressional spending power under Article I, Section 8. This subject was broached in *Pennhurst State School & Hospital* v. *Halderman*, 451

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[15] The Senate report recites that the Committee's purpose was to give effect to Section 208 of H.R. 4560. S. Rep. No. 97-581 at p. 14 (App. B pp. 3a-4a).

U.S. 1 (1981). But since the Secretary's statutory argument in this case is so deficient, the Court need not wrestle with the spending power limitation questions implicit in the Secretary's position.

Finally, the petition (p. 17) chastises the Court of Appeals for invoking principles of equity to sustain the states' entitlement to payment from remaining 1981 appropriated funds despite the alleged action of Congress to withdraw these funds. This misstates the decision. The Court below invoked the principle, adopted in previous cases, that filing suit before the close of a fiscal year serves to prevent the lapse of unobligated appropriations notwithstanding a failure of the District Court to award appropriate injunctive relief before the end of the fiscal year, if that failure is later determined to be erroneous. *See Jacksonville Port Authority* v. *Adams*, 556 F.2d 52 (D.C. Cir. 1977).[16] The Secretary argued to the Court of Appeals that the refusal to permit the use of 1982 funds for payment of the claims in issue was a reason for not applying the anti-lapse rulings of the prior cases. It was *that* argument that the court below found wanting in equity. Pet., App. pp. 40a-41a.[17]

## CONCLUSION

This Court has resorted to summary reversal on the basis of the certiorari papers in certain cases where the decision below "is so clearly erroneous as to make oral argument a waste of time" or where the case is "clearly

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[16] The petition does not seek review of this issue.

[17] The petition includes an extended discussion of the principle that courts must ordinarily apply the law in effect at the time decision is rendered, including any new statutes that have been enacted while the case is pending. Pet., pp. 14-17. We do not dispute this principle. In this case, it supports denial of the petition. The law *now* in effect, section 136 of Public Law 97-276 (which the petition virtually ignores), represents a resolution of the issue tendered by the petition in a manner contrary to the position advanced by the Secretary. (*See* pp. 15-16 and 17 above).

controlled by one or more of [the Court's] recent decisions." R. Stern & E. Gressman, Supreme Court Practice 362-63 (5th ed. 1978). In this case, the petition does not rest on a claimed inconsistency with past decisions of this Court, and the decision below was not clearly erroneous, but rather clearly correct. Moreover, the supervening action by the Congress in fashioning a compromise solution of the underlying problem eliminates any need or justification for further consideration by this Court.

For these reasons, the respondent states respectfully request that the Court decline the invitation to consider summary disposition and instead deny the petition for a writ of certiorari.

Respectfully submitted,

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January 1983

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

CA 81-02237

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No. 81-2090

STATE OF CONNECTICUT, *et al.*,

and

STATE OF CALIFORNIA,
*pltf-intervenor,*
v. *Appellants*

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*

Before: Edwards and Bork, Circuit Judges; Dudley B. Bonsal *, Senior District Judge for the Southern District of New York

### ORDER

Upon consideration of appellees' motion to extend stay of mandate, of the opposition of nine appellant states to said motion and of appellees' reply, it is

ORDERED, by the Court, that appellees' motion to extend stay of mandate is denied. Congress having directed in Pub. L. No. 97-276 that a schedule be established for the payment, over fiscal years 1984 through 1986, of any

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

claims legally required to be paid, and the Solicitor General having decided to file a petition for certiorari, the district court should, upon receipt of the mandate, consider the nature and length of the discovery and other proceedings needed to process the claims at issue and should, in order to accommodate potentially conflicting goals and to respect the legitimate concerns expressed by both parties, take whatever action is appropriate simultaneously to promote compliance with Congress's direction that payments begin approximately October 1, 1983, and to minimize any burden to the parties and to the court that may prove unnecessary in the event of Supreme Court review. And, it is

FURTHER ORDERED, by the Court, that the Clerk shall issue the mandate herein to the District Court forthwith.

*Per Curiam*
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

## APPENDIX B

EXCERPT FROM SENATE REPORT NO. 97-581, 97th CONG., 2d SESS., SEPTEMBER 23, 1982, ON CONTINUING APPROPRIATIONS FOR 1983 (REPORT TO ACCOMPANY H.J. RES. 599)

— 14 —

### SOCIAL SECURITY CLAIMS

Section 133. On July 27, 1982, the U.S. Court of Appeals for the District of Columbia Circuit, in *Connecticut* v. *Schweiker*, decided that the United States remained liable for the payment of $382,000,000 in claims asserted by the States and arising from their participation in the AFDC, medicaid, social services, and related or predecessor programs through which the States received Federal financial assistance from the Department of Health and Human Services (HHS) under various titles of the Social Security Act. Many of these claims, although presented for the first time in 1980 and 1981, are extremely old, in one case going back nearly 30 years to expenditures incurred in fiscal year 1954. HHS had refused to process them on the ground that they had not been filed within time limits established by the 1981 appropriation laws.

The Committee is advised that the court in its ruling gave inadequate weight to effect on these claims of language that appears in identical form in both the House and Senate versions of the Labor-HHS-Education appropriation bill, H.R. 4560, as incorporated by reference into the last continuing resolution for fiscal year 1982, Public Law 97-92. That language reads:

> Sec. [208] *207.* Notwithstanding section 306 of Public Law 96-272 or section 1132 of the Social Security Act, no payment shall be made from this or any other appropriation to reimburse State or local expenditures made prior to October 1, 1978, under

> title I, IV, X, XIV, XVI, XIX, or XX of the Social Security Act unless a request for reimbursement had been officially transmitted to the Federal Government by the State within 1 year after the fiscal year in which the expenditure occurred.

The Committee recommends this section of the bill to clarify the congressional intent, as expressed in the quoted language, that the claims in question are to be paid only if they had been formally filed with HHS within 1 year after the fiscal year in which the expenditure occurred. If a claim does not meet this criterion, it is to be permanently extinguished.